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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1327

THE BOEING COMPANY
(formerly The Boeing Airplane Company), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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The respondent class of non-converting holders of The Boeing Company's 4½% convertible subordinated debentures due July 1, 1980, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Second Circuit *en banc*, filed December 27,

1978. That decision, squarely in accord with a long line of decisions of this Court, does nothing more than allow the award of fees out of a common fund.

Question Presented

Should this Court review a decision which determines the source of a fee to be awarded in a unique case where (1) the Petitioner lacks standing; (2) the decision is consistent with a long line of decisions of this Court awarding fees from common funds; (3) liability was based upon New York law under the principles of pendent jurisdiction; and (4) no fee has yet been awarded?

Statute Involved

Section 475 of the *Judiciary Law* of the State of New York (29 McKinney's Consolidated Laws of New York at p. 631) provides:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Statement of the Case

Petitioner's statement of the case fails to note that liability was based solely on New York State law on a pendent jurisdiction count. No violation of federal law was found. In *Van Gemert I,* Petitioner was held liable under New York's law of contracts because of its failure to provide debentureholders with reasonable and adequate notice of the redemption of the convertible debentures (4a, 46a-47a, 73a).

As a result, judgment was entered in the District Court in favor of the plaintiff class and against Petitioner in the principal sum of $3,289,359 plus interest at "legal rates fixed by the State of New York" from March 9, 1966 to the date of the judgment (40a). Petitioner thereafter paid the judgment into court for distribution to the class in an aggregate sum in excess of $6,000,000, constituting the total of the principal and interest. The judgment provided that the plaintiffs' attorneys fees to be allowed by the court would be "paid out of said total amount of this judgment."

To date, no fees have been awarded or paid. All that has been determined is that counsel fees are to be charged against the entire judgment fund with the result that both claiming and non-claiming class members will bear their *pro rata* share of the fees.

The Court of Appeals *en banc,* affirmed the District Court holding that the fees and costs of counsel be assessed against the unclaimed, as well as the claimed, portion of a judgment. Its conclusion, the Court stated, was predicated on considerations of equity and sound policy and was sustained as well by longstanding precedent. The Court also stated that to hold otherwise would engender serious unfairness to claiming class members (3a).

Petitioner misreads the decision below by stating that it holds that class action attorneys are to be compensated on the basis of the maximum possible award to the class (Petition at 14). That decision merely held that counsel fees are to be assessed against the entire judgment fund. The decision below had nothing to do with the size of counsel fees, just their source.

Reasons for Denying the Writ

1. Having paid the judgment into court for distribution to the class members, Petitioner has no further claim against the judgment fund and, therefore, lacks standing to seek review concerning the distribution of that fund. When payment was made into Court, each debentureholder acquired title to his *pro rata* share of the fund and, simultaneously, Petitioner lost all interest therein.

2. The payment of fees to be awarded out of the common fund created is an exception to the "American rule" of attorneys' fees embraced by this Court in a line of cases going back to *Trustees* v. *Greenough*, 105 U.S. 527 (1882).

3. Under *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259, n.31 (1975), when liability is based on state law, as it was here, the determination of counsel fees is also a question of state law. This Court should not concern itself with an analysis of attorneys' liens under New York law.

4. Petitioner advised the panel which decided *Van Gemert II* that this case may be the only securities law class action ever to proceed through trial to a money judgment. Accordingly, the decision below is not of great importance to other litigants or to the public in general.

ARGUMENT

POINT I

Petitioner has no standing to question the award of attorneys' fees out of the judgment fund since it has no interest in that fund.

Having paid the judgment, Petitioner has no further claim whatsoever against the judgment fund since it is vested, *pro rata*, in the class members, both claiming and non-claiming.* *Pennsylvania Railroad Company* v. *United States*, 98 F.2d 893 (3d Cir. 1938); and *Hansen* v. *United States*, 340 F.2d 142 (8th Cir. 1965). Where a party has no recognizable claim of monetary damage or interest, no legal controversy exists and such party lacks standing to litigate. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

In *Pennsylvania Railroad Company* v. *United States*, *supra*, a class action remarkably similar on its facts to this case, judgment had been entered against the Railroad in favor of certain bondholders of a subsidiary. The Railroad paid to trustees the amount of the judgment for distribution to claiming bondholders. Eighteen years after the entry of judgment, with a portion of the fund still unclaimed, the Railroad filed a petition asserting ownership of the remaining funds.

The court held that the Railroad had no legal interest in the funds since title had passed to the bondholders upon deposit of the judgment. The Court said:

> "While the payment was made to a trustee for the bondholders the trustee was a mere distributing

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* Under New York State law, a judgment can be enforced within twenty years of its entry. Therefore, it will not be known for many years what portion of the judgment fund will ultimately be claimed by class members.

agent and *each of the bondholders acquired title to his pro rata share of the fund.* As the court below pointed out, the situation, so far as the Railroad Company was concerned, was the same as if it had paid its promissory note to a collecting bank which held the proceeds awaiting the call of the payee. The money with which it made the payment was its money until payment. At that moment, however, title passed to the holders of the bonds. Consequently thereafter the Railroad Company had no more title to the money than it would have had if it had used it to pay any other debt." 98 F.2d at 894 (Emphasis added).

Since title to the deposited judgment fund has passed, *pro rata* to the class members, Petitioner has no further right to it and, therefore, lacks standing to litigate questions concerning its distribution.

POINT II

The decision below follows the well established common fund rule and is consistent with *Alyeska.*

Petitioner argues that the decision below conflicts with *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *Alyeska* does not apply because *Alyeska* did not involve the creation of a common fund.

Where a common fund has been created through the efforts of plaintiffs' attorneys, such attorneys are entitled to an award of fees based upon the entire amount of the fund prior to its distribution. *Trustees* v. *Greenough,* 105 U.S. 527 (1882). In *Greenough,* as in this case, the plaintiff had brought an action on behalf of himself and similarly situated bondholders and succeeded in establishing a fund for the payment of principal and interest due on the bonds. He then sought to collect attorneys' fees and other expenses from the fund created even though not all of the bondholders filed claims. *Id.* at 529.

In supporting payment of attorneys' fees out of the entire fund, claimed and unclaimed, this Court stated:

> "He [the plaintiff] had worked for them [the other bondholders] as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. *To make them a charge upon the fund is the most equitable way of securing such contribution.*" *Id.* at 532 (Emphasis added).

Such a charge upon the common fund is exactly the relief ordered by the Court below which expressly relied upon *Greenough* and its progeny. *Greenough* has been "consistently followed" by this Court. See *Alyeska* at pp. 257-258.

By contrast, no common fund and no monetary recovery whatever were created by the plaintiffs in *Alyeska.* The plaintiffs in *Alyeska* sought a true shifting of the burden of fees from themselves to the defendants. No such shifting of fees to defendants is sought here by plaintiffs' counsel who seek fees only out of the fund they have created.

Since the decision below is squarely within the almost century-old line of precedents beginning with *Greenough,* it does not warrant review by this Court.

This case plainly meets all the established criteria for a common fund as set forth by this Court in *Alyeska.* See the analysis of these criteria as applied to the facts in this case in the decision below at pp. 9a-11a.

POINT III

This Court should not review a decision governed by New York state law.

Judgment was entered in favor of plaintiffs by virtue of the defendants' liability under a pendent New York state claim.* No finding of liability was based on federal law. In *Alyeska,* this Court noted that in diversity actions the question of the award of fees is normally governed by state law. 421 U.S. p. 259, fn. 31.

The decision below is in strict accord with Section 475 of the *Judiciary Law* of the State of New York which provides:

> "From the commencement of an action . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his clients' favor, and the proceeds thereof in whatever hands they may come . . ."

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* In their petition for writ of certiorari, dated September 22, 1975, in *Van Gemert I* (denied at 423 U.S. 947 (1975)), Petitioners stated (at p. 18):

> "Here, the purely state law claim asserted by the Debenture holders as to the adequacy of the notice given them of the call was the very heart of the case from the time it was commenced in 1966 and this claim could have been maintained separately in a state court."

POINT IV

The decision below is not of great importance to other litigation.

Petitioner has described this case as perhaps the only securities class action which has proceeded through trial to a money judgment (Petitioner's brief, dated February 7, 1977 at p. 29, submitted in *Van Gemert II*). Petitioner's statement is buttressed in *Developments—Class Actions,* 89 Harv. L. Rev. 1318, 1373 n.5 (1976), which cites, *inter alia,* the *American Trial Lawyers, Special Committee on Rule 23 of the Federal Rules of Civil Procedure, Report and Recommendation* 15-16 (1972) to the effect that from 1966 to 1972 no antitrust or securities class action had proceeded through trial to actual determination of damages.

This case, therefore, is *sui generis.* Since the decision below is premised upon payment of fees to be awarded from a fund created as a result of a judgment after trial, and not as a result of a settlement, the issues presented are unique to this case and do not warrant the exercise of this Court's jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York
March 27, 1979

Respectfully submitted,

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